In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Carolyn J. Evans respectfully urges that the Petition for a Writ of Certiorari filed herein by United Air Lines, Inc. (hereinafter "United") be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Where an employer's current seniority practice treats that employer's prior discriminatory termination of a reinstated former employee as a break in service, thereby creating a current loss of seniority, a current disparity, and a perpetuation of the effects of the prior discrimination, can that current seniority practice be held violative of Title VII of the Civil Rights Act of 1964 as to that employee?

2. Is the denial, by order of the Court of Appeals, of a simple motion to dismiss the complaint, ripe for review by this Court at this time?

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter the "Act"), 42 U.S.C. §2000e *et seq.*, specifically Sections

703(h), 706(e) and 706(g) thereof (42 U.S.C. §§2000e-2(h), 2000e-5(e), and 2000e-5(g)). These sections are set forth in their entirety at Appendix, p. 6a.

STATEMENT OF THE CASE

Respondent Evans wishes to add the following to the summary of the parties' respective positions offered by United in its Statement of the Case.

1. Carolyn Evans does not seek that back pay which was lost solely as a result of United's unlawful termination of her in 1968; rather, she seeks seniority credit which she is currently being denied due to United's reliance upon her 1968 termination as a break in her service for current seniority purposes. The back pay and other relief sought in addition to seniority credit are limited to those benefits, wages, or perquisites which Mrs. Evans would have enjoyed since February 16, 1972 had she not been victimized by United's current practice with respect to her seniority, and were she instead being credited with seniority from her original date of hire and for all periods she has actually worked for United.

2. It is somewhat misleading to state that Mrs. Evans simply seeks a restoration of seniority she "lost . . . in 1968", because seniority has meaning only in an on-the-job context. Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her re-employment, continues to the present, and will continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits, and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that

past act, it has inexorably tied that past discrimination[1] to its present treatment of Mrs. Evans' seniority. Thus, Mrs. Evans' theory of relief, advanced both in District Court and on appeal, and accepted by the Court of Appeals, consists of two premises:

(a) That the "continuing practice" challenged is that ongoing seniority practice (the "continuing discrimination"), and that her charge was timely filed with respect thereto; and

(b) That said practice is *illegal* because it perpetuates the effects of past discrimination, and actively enables prior discrimination to reach effectively into the present. (Mrs. Evans thus finds herself with less seniority, fewer benefits, and less protection against layoff, than similarly situated males: i.e., males hired at the same time or later than she originally was, and males with the same or less actual length of service with United.)

3. As this case has arisen on a motion to dismiss the Complaint, said pleading is reproduced herein (without Exhibits) and appears at Appendix, p. 1a. United's Statement of the Case failed to note that Mrs. Evans filed a grievance protesting United's seniority practice on October 16, 1972.[2] Said grievance was denied. (Para. IX of the Complaint.)[3]

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[1] The "no-marriage rule" for stewardesses, which occasioned the 1968 termination, was found to be violative of Title VII in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir., 1971) *cert. denied*, 404 U.S. 991 (1971).

[2] We are prepared to prove, if necessary, that Mrs. Evans was treated as a probationary employee when she was reinstated, and that her grievance was filed shortly after that probationary period expired.

[3] Upon consent order of the Magistrate, Mrs. Evans also filed a Reply to the Answer, in lieu of an Amended Complaint, stating that state administrative remedies had been exhausted through the EEOC deferral process.

4. Mrs. Evans takes issue with several other of the characterizations of the case and the parties' arguments below, as well as conclusions of law, made in United's Statement of the Case. However, since these matters are more appropriately the subject of argument, they will be dealt with in the Argument portion of this Brief.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The decision of the Seventh Circuit Court of Appeals will have no deleterious effect on the time limitation set forth in Section 706(e) of the Act, and is in fact in conformity with the plain language of the Act and established case law. Rather, a reversal of the Court of Appeals' decision would unsettle employment discrimination law heretofore fashioned and established by the Courts over the last decade, and would conflict with both this Court's earlier pronouncements in employment discrimination cases under the Act and Congress' apparent purpose as reflected in the Act.

2. The decision below is both logical and well-grounded in established case law. It does not create a conflict among the Circuits; *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir., 1975), is clearly distinguishable and creates no anomaly between the rights of former employees who are rehired and those who are not.

3. The Seventh Circuit's decision is entirely consistent with this Court's reasoning in *Franks* v. *Bowman Transportation Co.*, 424 U.S. ....., 96 S.Ct. 1251 (1976) and its action in other cases.

4. As this case arises on a motion to dismiss, and the Court of Appeals' decision effects simply a denial of said motion and remand for trial, the decision has become interlocutory in nature and is not a final disposition of

the case; the case is therefore not ripe for review, since review is not necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. *American Construction Company* v. *Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). *See* also, *Liberty Mutual Insurance Co.* v. *Wetzel*, ... U.S. ....., 96 S.Ct. 1202 (1976).

SUMMARY OF ARGUMENT

As the Court of Appeals correctly reasoned, the issue in this case is not whether Mrs. Evans' EEOC charge was timely filed. Since the employment practice here being directly challenged is United's current seniority practice with respect to Mrs. Evans (not the 1968 termination), and since the charge was timely filed with respect to that seniority practice, the real issue here is whether or not that challenged seniority practice is illegal.

The Court of Appeals correctly concluded that said practice is illegal because it perpetuates and actively gives present effect to prior post-Act discrimination against Mrs. Evans—namely, her prior illegal termination. This is so because United today relies on that termination as a break in service. *Collins* is distinguishable because there, the refusal to hire was not based on prior discrimination, nor was it even alleged to be. Here, the current practice is admittedly based on prior discrimination. The two cases are thus compatible.

Moreover, as this Court reasoned in *Franks*, Section 703(h) of the Act cannot operate as a bar to Mrs. Evans' claim, since the prior discrimination involved here was post-Act rather than pre-Act. And this Court's dictum in *Franks* confirms the soundness of the analysis set forth above and utilized by the Court of Appeals.

ARGUMENT

I

The Time Limit Of Section 706(e) (Formerly 706(d)) Was Satisfied In This Case

At the time Mrs. Evans filed her EEOC charge herein[4] (February 21, 1973), Section 706(e) of the Act required her to file within 180 days of the occurrence of the alleged unlawful employment practice. Mrs. Evans did so. There has therefore been no departure from the plain language of the Act.

The "employment practice" here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: United engages in and will engage in its challenged seniority practice whenever it makes flight assignments to Mrs. Evans, computes her paycheck, schedules her vacation, prepares to lay off or recall flight attendants, determines her pension entitlements, or utilizes "benefit"—or "competitive"—seniority in any other aspect of her employment.

The proposition, accepted by the Court of Appeals here, that a charge filed during the operation of a continuing employment practice or policy is timely, has been firmly established.

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[4] As the Court of Appeals was informed at oral argument, the Commission accepted jurisdiction of Mrs. Evans' charge as timely.

Congress clearly anticipated and provided for the possibility that there could be "continuing violations" and that a charge could be timely filed over 180 days after the *commencement* of a practice but during the ongoing operation thereof. This is the clear import of the provision, in Section 706(g) of the Act (Appendix, p. 7a) that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." For the quoted provision would have meaning only in a case such as this—where the challenged practice or policy, and the injury resulting therefrom, are of a continuing nature.

That this was in fact the true Congressional intent is confirmed by the legislative history of the 1972 Amendments to Title VII. The Committee Report adopted by both the House and the Senate contained the following language in reference to §706(e) (the time limits provision):

> "This subsection provides that charges be filed within 180 days [or 300 days if proceedings are filed with a state or local agency] of the alleged unlawful employment practice. *Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued,* and other interpretations of the courts maximizing the coverage of the law is not affected." 118 Cong. Rec. 7167 (Senate, March 6, 1972); 118 Cong. Rec. 7565 (House, March 8, 1972). (Emphasis added.)

In accepting Mrs. Evans' theory of timeliness based upon the existence of a continuing employment policy or practice, the Seventh Circuit acted in accordance with widely established case law on point—much of which existed when Congress amended Title VII in 1972—covering a wide variety of "continuing practice" situations (including many wherein a facially neutral seniority practice was being challenged).[5]

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[5] *Bartmess* v. *Drewrys U.S.A., Inc.,* 444 F.2d 1186 (7th Cir., 1971), *cert. den.* 404 U.S. 939 (1971); *Cox* v. *U.S. Gypsum Company,* 409 F.2d 289 (7th Cir., 1969); *Burwell* v. *Eastern Air Lines,* 394 F.Supp. 1361, 1367 (E.D.Va., 1975) (loss of seniority); *Tippett* v. *Liggett & Myers Tobacco Co.,* 316 F.Supp. 292 (M.D.N.C., 1970) (loss of seniority); *Healen* v. *Eastern Air Lines,* ..... F.Supp. ....., 8 FEP Cases 917 (N.D.Ga., 1973) (loss of seniority); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C.Cir., 1973); *Sciaraffa* v. *Oxford Paper Co.,* 310 F. Supp. 891 (D.Me., 1970); *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515 (S.D.N.Y., 1973), *app. dism.* 496 F.2d 1094 (2d Cir., 1974); *Watson* v. *Limbach Company,* 333 F.Supp. 754 (S.D.Ohio, 1971); *Jamerson* v. *Trans World Airlines,* ..... F.Supp. ....., 11 FEP Cases 1475 (S.D.N.Y., 1975) (loss of seniority); *Jamison* v. *Olga Coal Co.,* 335 F.Supp. 454 (S.D.W.Va., 1971); *Moreman* v. *Georgia Power Co.,* 310 F.Supp. 327 (N.D.Ga., 1969). Moreover, said rationale implicitly underlies the acceptance of plaintiffs' theory of relief in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), where this Court permitted continuing discriminatory practices and policies to be challenged under Title VII, and the several Court of Appeals and other cases cited in Part II of this Brief, wherein continuing seniority, transfer and other practices were challenged as illegal for perpetuating the effects of past discrimination and the time limits of the Act were implicitly assumed to be satisfied. Thus, for example, *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 795-796 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971) stands for the proposition that a facially neutral seniority practice which perpetuates the effects of past discrimination is in fact a continuing violation of Title VII.

As one court aptly summarized the state of the law:

> "It is clear that the filing of a charge with the EEOC within 90 days [extended to 180 or 300 days in 1972] after the alleged unlawful practice occurs is a jurisdictional prerequisite to a subsequent court suit under Title VII. . . . However, if the alleged violation is deemed to be 'continuing,' it has been consistently held that the 90 day period does not bar an ensuing court action." *Sciaraffa* v. *Oxford Paper Company,* 310 F.Supp. 891, 896 (D.Me., 1970).

Every one of the cases cited by United on pages 8 through 14 of its Brief are inapposite. Those cases stand simply for the general proposition that satisfaction of the Act's time limits is a jurisdictional prerequisite to suit. The parties agree on that score. The cited cases either involved only discharges and nothing more—unlike the case at bar, wherein a current and continuing on-the-job seniority practice has been challenged—or are otherwise easily distinguished. Thus, for example, in *Griffin* v. *Pacific Maritime Assoc.,* 478 F.2d 1118 (9th Cir., 1973), *cert. denied,* 414 U.S. 859 (1973), plaintiffs' Title VII claim was deemed barred for failure to exhaust administrative remedies since they had filed no charges at all with any appropriate agency; the other statute pursuant to which they proceeded—42 U.S.C. §§1981 and 1985—is not in issue here. In *East* v. *Romine, Inc.,* 518 F.2d 332 (5th Cir., 1975), there was apparently no allegation that the current refusal to hire was in fact *based* on the prior refusal to hire. The employer had thus not tied the past refusal to the current refusal. (The charge was therefore found timely in relation to the current refusal, and an earlier charge, filed beyond the time limit in relation to the earlier refusal, was found untimely since that was the only practice attacked in that earlier charge.)

In *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W.D.Va., 1969), although plaintiff contended that the discriminatory policies which gave rise to his transfer were of a "continuous" nature, his complaint attacked not those "continuous" policies (he did not apparently allege that he had been injured by them after his transfer and within the timely filing period preceding his charge) but merely directly attacked the transfer itself. His charge was untimely as to *that transfer*, the alleged unfair employment practice. Here, by contrast, Mrs. Evans is directly attacking a continuing seniority practice which is being implemented and causes injury to her today, and her charge was timely *as to that alleged unfair employment practice.*

In *Buckingham* v. *United Air Lines, Inc.*, ... F.Supp. ....., 11 FEP Cases 344 (C.D.Cal., 1975), the transfers occurred prior to the 1965 effective date of Title VII (and were thus not unlawful); furthermore, neither the pre-Act transferees nor the post-Act terminees could directly challenge the "no-marriage" rule or the agreement ending it (which was consummated within 90 days of the date they filed charges) since they could not show that they themselves were unfairly injured by the rule or the agreement within the 90-day period (the transferees were not then stewardesses and the terminees were not then employees). Similarly, the key distinction in *Kennedy* v. *Braniff Airways, Inc.*, 403 F.Supp. 707, 709 (N.D.Tex., 1975) is that there—unlike here—the past discrimination occurred *prior* to the effective date of Title VII, as the Court took pains to point out; we also note that the case pre-dates this Court's ruling in *Franks, supra.*

Lastly, *Cates* v. *Trans World Airlines*, ... F.Supp. ....., 13 FEP Cases 201 (S.D.N.Y., 1976), is entirely distinguishable on its facts: Of the three named plaintiffs,

two (Cates and George) filed EEOC charges *over a year and a half after they were laid off pursuant to the challenged seniority practice,* and the Court in fact assumed their day of layoff was the last day on which the seniority practice operated against them (13 FEP Cases at 208). As to the third (Whitehead, discussed in the passage quoted by United), the Court found that he had never actually been denied employment (13 FEP Cases at 208). Unlike Cates and George, Mrs. Evans filed charges *during* the pendency of the seniority practice, and thus was timely. And, unlike Whitehead, Mrs. Evans is an *identifiable victim* of past discrimination, and is thus entitled to relief. Furthermore, much of the District Court's reasoning in *Cates* may well be suspect in light of the Second Circuit's scholarly decision in *Acha* v. *Beame,* 531 F.2d 648 (2d Cir., 1976), which is discussed below.

In all of the other cases cited by United—with the *seeming* exception of *Collins,* discussed *infra*—the only practice being challenged was the actual discharge. None of those cases involved an attack upon a current and continuing seniority practice such as that being challenged here by an employee who is today suffering injury *on the job* because of it. That practice is a continuing one, whereas a discharge itself is not.

That distinction is critical—for, as the Eighth Circuit noted in *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir., 1975).

> "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time."

From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a

jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. Conversely, United has never disputed the proposition that if its challenged current seniority practice is unlawful under the Act, then Mrs. Evans' EEOC charge was timely filed. Thus, the real issue here has nothing to do with time limits; rather, the question is, purely and simply, is the challenged seniority practice *unlawful*? The Court of Appeals correctly decided that issue in the affirmative.

II

United's Current Seniority Practice Is Unlawful As Applied To Mrs. Evans Because It Is Based On, And Perpetuates The Effects Of, Prior Discrimination

Carolyn Evans was no stranger to United Air Lines when she was reinstated in 1972, and United knew it. By relying on the 1968 termination as creating a break in service, and giving effect to that break in service in its current seniority practice with respect to Mrs. Evans, United is actively enabling that prior discrimination to reach effectively into the present. United thus visits new losses upon Mrs. Evans and creates a present disparity, for Mrs. Evans finds herself at a significant disadvantage as compared with male flight attendants who (1) were hired between 1966 and 1972 (i.e., at the same time or even later than she originally was) and/or (2) have less actual length of service than she has.

In ruling that United's seniority practice is therefore unlawful with respect to Mrs. Evans, the Seventh Circuit followed Title VII case law which had been previously established by numerous Courts of Appeals as well as this Court, and in many other decisions.

As the Seventh Circuit noted, this Court stated in *Griggs, supra*, 401 U.S. at 430:

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

In *Acha* v. *Beame*, 531 F.2d 648 (2d Cir., 1976), the Court of Appeals, in reversing dismissal of the complaint, held that a facially neutral, date-of-hire seniority system (like United's here) was discriminatory *as applied to plaintiffs* because it perpetuated the effects of past sex discrimination against them (there, a previous refusal to hire based on sex).[6] By relying on date-of-hire in computing seniority in the case of the identifiable victims of past hiring bias, the employer disadvantaged said plaintiffs as compared with males who were hired at the same time or later than plaintiffs would have been had the prior discrimination not occurred. Similarly, by relying on date-of-rehire and treating her prior illegal termination[7] as a break in service, United has disadvantaged Mrs. Evans as compared with males hired at the same time or later than she originally was, and males with less length of service than she actually has.

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[6] In that case, EEOC charges were filed well beyond the 706(e) limitation period with respect to the hiring discrimination but, as here, during the pendency of the seniority practice. There, as here, it was the seniority practice that was being attacked.

[7] This Court recognized in *Franks, supra*, 96 S.Ct. at 1266, that discriminatory hiring and discharges are "related 'twin' areas".

In fact, virtually every other Circuit Court of Appeals which has had an opportunity to rule on the issue, and whose ruling has either not reached or has been left undisturbed by this Court, has held, as did the Seventh Circuit, that if, as here, a current, facially neutral seniority or other employment practice perpetuates and locks in the effects of prior discrimination, then that current practice may be found unlawful under Title VII even if the policies which gave rise to the past discrimination are no longer in effect. *U.S.* v. *Bethelehem Steel Corp.*, 446 F.2d 652 (2d Cir., 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971); *Local 189, United Papermakers* v. *U.S.*, 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919 (1970); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 236 (5th Cir., 1973); *U.S.* v. *N.L. Industries*, 479 F.2d 354 (8th Cir., 1973); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir., 1970), *cert. den.* 401 U.S. 954 (1971). The EEOC has ruled the same way in a case virtually on all fours with *Evans*, *EEOC Dec. No. 71-413*, 3 FEP Cases 233 (1970). (This Court ruled in *Griggs, supra*, 401 U.S. at 434, that the Commission's interpretations of Title VII are entitled to great deference.)[8]

Moreover, the one pertinent major appellate case upon which this Court has ruled and which heretofore had provided possible contrary authority—*Jersey Central Power & Light Company* v. *International Brotherhood of Electrical Workers*, 508 F.2d 687 (3d Cir., 1975)—was vacated and remanded for further consideration in light of *Franks*.

[8] Among the many other cases in accord with this rationale are the closely analogous *Tippett*, *Healen*, *Burwell*, and *Jamerson* cases, *supra*, and *Payne* v. *Travenol Laboratories*, ... F.Supp. ....., 12 FEP Cases 770 (N.D.Miss., 1976). *See* also *Marquez* v. *Omaha District Sales Office*, 440 F.2d 1157 (8th Cir., 1971).

E.E.O.C. v. *Jersey Central Power & Light Co.*, ... U.S. ....., 96 S.Ct. 2196 (1976).[9]

United argues that the application of this widely accepted rationale to the case at bar "effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act." This alarmist position is unsound for several reasons.

First, the established principles for which *Evans* stands do not constitute an unfair trap for the innocent employer. Carolyn Evans has in fact filed a timely charge vis-à-vis the challenged employment practice. That seniority practice is no mere "effect"—it is an *active policy* which creates a current disparity. United itself opened the door to this litigation by explicitly relying on the present on its own past discrimination to penalize in a new way its own prior victim; United has no one to blame but itself. Under the circumstances, United is knowingly responsible for the relation between its present practice and its past discrimination.

Second, consistency and logic dictate that to deny the applicability of the rationale adhered to by the Seventh Circuit in this case would be to deny its applicability to the many cases set forth above, including rulings by the Second, Fourth, Fifth, Eighth and Tenth Circuits as well as this Court, and would throw heretofore settled employment discrimination law into a state of chaos. For United

[9] *Watkins* v. *United Steel Workers*, 516 F.2d 41, 44-45 (5th Cir., 1975) is distinguishable from the instant case in that there, unlike here, the plaintiffs challenging the seniority practice were not the *identifiable victims* of past discrimination, as the Court there made clear in its meticulously worded holding. This distinction was noted in *Payne*, *supra*, 12 FEP Cases at 784, and is significant in light of *Franks* and *Acha, supra*.

is not merely seeking to preserve a time limitations rule; that rule is not in issue. United is asking this Court to reject an established, substantive principle of Title VII law; it is asking this Court to declare that an employer may deny benefits to or otherwise injure an employee by applying to that employee a current facially neutral employment practice which creates a current disadvantage and disparity by giving present effect to prior discrimination against that employee by that employer. If that is so, the result would be disastrous. It would mean, in effect, that facially neutral employment practices— such as the invidious practices this Court struck down in *Griggs*— would no longer be attackable. Where a present policy is not facially neutral, it is of course attackable *per se;* but where, as in *Griggs,* the present policy *is* facially neutral, the attack must perforce be based upon the fact that the challenged practice prepetuates and locks in the effects of past discrimination. United seeks an end to such challenges and would thwart Congress' purpose in enacting Title VII.

Thus, United does not seek to prevent the opening of a new floodgate; rather, it seeks to close a well-traveled avenue of relief. Although they have recently been subjected to a great deal of publicity, there is no reason to believe that the cases in which, as here, a seniority practice is challenged as perpetuating the effects of prior discrimination would not continue to constitute a relatively small percentage of Title VII cases. And of those cases that do arise, established law has placed even further limits. First, under *Evans,* this Court's ruling in *Franks, supra,* and the *Acha* case, *supra,* only the identifiable victims of past discrimination would be entitled to relief; furthermore, as noted above, in 1972 Congress limited retroactive back pay relief to two years prior to the date of the

charge, and if further limitations are to be placed, Congress may do so.[10]

The doctrine necessarily applied by the Seventh Circuit in this case has historically been applied in situations, like this one, where the challenged action by the employer is a *seniority* practice; in such cases, the practice is characteristically of a continuing nature and is perforce tied to employment history and past actions affecting length-of-service. There need be no fear that the rationale which was once again correctly applied by the Court of Appeals here in a seniority context will be dramatically extended beyond its present scope. Were that to occur in some future case, the time for review by this Court would be then— not now.

Lastly, United suggests that it is not unreasonable to require Carolyn Evans to have taken timely steps at the time of her termination to protect her rights. The claim Mrs. Evans could have pressed in 1968 is not being "unbarred" here. For not challenging the 1968 termination at that time, Mrs. Evans, like the plaintiffs in the seniority cases cited above, has in fact already suffered an appropriate permanent and irretrievable loss of rights—chiefly, four years of back pay (1968-1972) which are concededly beyond the scope of this litigation. The seniority cases cited above involved past discrimination only because and to the extent that the employers there chose to actively perpetuate the past bias through their current practices. Similarly, this case involves the 1968 termination only

[10] The doctrine applied by the Seventh Circuit in this case was in existence before Congress amended Title VII in 1972; as noted in *Franks,* 96 S.Ct. 1264, n. 21, the absence of a contrary indication by Congress at that time reflects its assumption that this doctrine would continue to be applied.

because, and to the extent that, United has chosen to rely on that past discrimination and actively perpetuate in new form certain effects thereof through its current practices. Mrs. Evans seeks redress only for the injury and disadvantage she has suffered since her reinstatement due to the current seniority practice which she is challenging herein. Is it any less reasonable to require United to bear the responsibility for its present actions, whereby it openly uses its own past discrimination as an excuse to deny Mrs. Evans benefits today?

III

Collins And Evans Are Compatible— There Is No Conflict Among The Circuits

As Judge Cummings noted in dissenting to the Court of Appeals' first opinion (Petitioner's Appendix, p. A 12):

> "The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone *unless the refusal is motivated by discrimination.* There was no evidence in *Collins* that the decision not to rehire the plaintiff was based at all *upon the past act of discrimination.*" (Emphasis supplied.)

Unlike the case at bar, there was no allegation in *Collins, supra,* that United's refusal to rehire her was *based* at all upon her 1967 termination; rather, plaintiff in *Collins* in effect sought to have the Ninth Circuit declare that the failure to rehire was *per se* unlawful simply because her continuing non-employment to that point was attributable to the prior discrimination. *Collins* thus was truly challenging the mere passive *effects* of the prior termination and nothing more; no present act of United, either on or off the job, was actually *based* on that prior discrimination.

This is a crucial difference. United incorrectly states (Petition, p. 19) that the Court of Appeals confused the *effects* of an act of discrimination with the *act* of discrimination itself. Rather, in likening *Collins* to *Evans,* United has confused the mere passive effects of past discrimination (*Collins*) with a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination, reactivates it in a new form, and results in present disparity and injury (*Evans*).

Plaintiff in *Collins* did not allege that United had refused to rehire her *because* she had once been terminated, or *because* United had a policy of not hiring former terminees and/or discriminatees, or *because* it did not wish to credit her with her prior service. (Had she done so, *Collins* would have been an entirely different case on its facts and would then have been closer to *Evans.*) Here, by contrast, it is uncontroverted that United refuses to credit Carolyn Evans with her prior service *precisely because* she had been terminated—which was an act of discrimination. Thus, the crucial distinction between the cases is that the challenged practice in *Collins* was not based on prior discrimination, whereas the challenged practice here is.

Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins,* it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases

were rightly decided, and are logically and pragmatically consistent with each other.

Lastly, United's suggestion that *Evans* will discourage the rehire of former discriminatees is absurd. If anything, *Evans* would in fact have the opposite effect—for, as the point of distinction between *Collins* and *Evans* demonstrates, it may well be held *unlawful* for an employer to *base* a refusal to rehire a former employee on the fact that said employee was a former discriminatee. (No such allegation was made by plaintiff in *Collins*, of course.)

IV

The Court Of Appeals' Decision Is Entirely Consistent With This Court's Reasoning in Franks v. Bowman

United has taken the position that, since *Franks* was, strictly speaking, a remedy case and did not involve time limits, it was wrong for the Court of Appeals to take guidance from this Court's reasoning therein. United misconceives the application of *Franks* because of its misconception of the issue in *Evans*. Because the question here is not whether the charge was timely, but is, rather, *whether the challenged seniority practice is illegal*, the reasoning this Court followed in *Franks* bears directly on the issue at bar.

In order to show that the Court of Appeals' analysis was wrong, United has to establish that the challenged seniority practice, even though it creates a current disparity and perpetuates the effects of past discrimination, is not legally subject to Mrs. Evans' line of attack under Title VII. Since this case arises on a motion to dismiss and Mrs. Evans has advanced a clear theory of relief, there are two possible ways in which United could logically

have defended: (1) by using case law to demonstrate the lack of support for Mrs. Evans' legal theory and the inapplicability of the cases she adduces in her behalf, and/or (2) by seeking to rely upon a statutory protection, as the Court of Appeals recognized. United's defense has, instead, largely been one of avoidance. It has not questioned the applicability of the massive pertinent case law of at least five circuits. It has renounced reliance on Section 703(h) of the Act, and persists in adducing inapposite cases for the mutually agreed-upon proposition that, *if* Carolyn Evans were simply and solely attacking the 1968 termination, *then* her charge would have been untimely. What United fails to realize is that, in order for that argument to succeed, it has to show that its current seniority practice is immune from the attack being made upon it.

In light of the real issue presented by this case and as stated by the Court of Appeals in Part III of its final opinion, *Franks'* application herein is simple. Bowman had interposed the defense—albeit in a remedy case—that Section 703(h) immunized its seniority policy from attack, alteration, or interference under Title VII. In order to deal with that defense, this Court had to decide the nature of the substantive protection afforded by that section. It did so quite clearly:

> ". . . [I]t is apparent that the thrust of the section is directed towards defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring *prior to the effective date of the Act.*" (96 S.Ct. at 1263; emphasis supplied)

This being the case, it is readily apparent that if, as here, the operation of a seniority system is challenged as per-

petuating the effects of discrimination occurring *after* the 1965 effective date of the Act, then Section 703(h) of the Act does not apply and cannot "be used to interpose a legal bar to Evans' theory"—as the Court of Appeals correctly concluded. The fact that Congress made no changes in this Section in 1972 despite preexisting case law supportive of *Evans* is further reason to conclude that the Court of Appeals' disposition of this case comports with the legislative intent behind the Act. As this Court reconfirmed in *Franks*:

> ". . . Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . ." (96 S.Ct. at 1263; emphasis supplied)

This Court said more in *Franks,* of course. It is apparent that an essential premise for the Court's conclusion, that retroactive seniority is an appropriate form of relief for the identifiable victims of past discrimination in hiring, is the realization—albeit in dicta——that without such relief, the effects of that past discrimination would be continually perpetuated by the employer's seniority policy, and a current and future disparity would exist, for the employee would

> ". . . perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." (96 S.Ct. at 1266)

It was in the context of this dictum that the Court of Appeals examined the applicability to this case of the rationale which had been applied by the long line of cases set forth in Part II hereinabove, and so it found

that "[t]he teaching of *Franks* confirms these holdings" (Petitioner's Appendix, p. A 20).

Mrs. Evans does not seek to dismantle United's seniority *system*—she merely wishes the inequity produced by its application to her to be removed, so that she may assume her rightful place within that system. We note, too, that the concern addressed in the dissenting opinions of this Court in *Franks*—as to the effect on other employees of "competitive seniority" (as opposed to "benefit seniority") relief—is not presented by *Evans* at this time and is thus not ripe for review. In any event, of course, the practical ramifications of a single aspect of the relief sought should not in all fairness be allowed to affect the determination as to whether or not Mrs. Evans has alleged a substantive violation of the Act sufficient to withstand United's motion to dismiss.

Conclusion

Denial of United's Petition would be an exercise of sound judicial discretion.

The Court of Appeals correctly applied settled and consistent legal principles—firmly grounded in the decisions of this Court, and numerous Courts of Appeals—and thereby reached a sound and logical result. United has demonstrated neither the legal insufficiency of Mrs. Evans' claim nor the inapplicability of her theory of relief to the facts alleged in the complaint.

The *Evans* decision opens no new loophole in the time limits set forth in the Act. It is compatible with *Collins,* and so presents no conflict among the Circuits. *Evans* is no mere "effects" case—this lawsuit challenges a quite

real ongoing employment practice which, in its application to Mrs. Evans, is based upon and gives present effect to past discrimination. The decision will not discourage employers from rehiring former discriminatees; if anything, it may well have the opposite effect and help fulfill the "make whole" purpose of Title VII.

The Court of Appeals' decision is entirely consistent with both the letter and the spirit of this Court's reasoning in *Franks* and does not conflict with that case—or any other decision of this Court—in any way. No departure from settled law, logical reasoning, or the usual course of judicial proceedings, has occurred so as to call for an exercise of this Court's power of supervision. The *Evans* decision raises no new important question of federal law which requires settling by this Court; it rests squarely and finally upon established precedent.

However, if this Court were to disturb *Evans,* the established principles for which it stands would be undermined; a prior landmark decision of this Court would be drawn into question, as would heretofore accepted rulings of other federal courts; and the law would be thrown into a state of chaos by what would necessarily be a confusing and far-reaching retrenchment. Review of this case would be especially inopportune now, at a time when this Court has, through *Franks* and the *Jersey Central* remand, already provided adequate guidance for the future.

Lastly, and in any event, this case is not ripe for review by this Court, because the decision of the Court of Appeals, which results simply in the denial of a motion to dismiss the Complaint, is not a final result.

For the foregoing reasons, and in the absence of any countervailing consideration within the reasonable purview of Rule 19 of this Court, Carolyn Evans respectfully urges that United's Petition be denied.

Respectfully submitted,

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Counsel for Respondent

Dated: October 6, 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROLYN J. EVANS,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

No. 74 C 2530

COMPLAINT

Plaintiff complains of defendant as follows:

I. This is a suit for injunctive and other relief authorized by and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The jurisdiction of the Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §2000e-2, making it illegal to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex.

II. Defendant United Air Lines, Inc. (hereinafter referred to as United) is a corporation doing business throughout the United States, with a major place of business in the Northern District of Illinois. Plaintiff Carolyn J. Evans is a stewardess employed by United, and is a resident within the Northern District of Illinois. The unlawful employment practices alleged herein were committed within the territorial jurisdiction of this Court as provided in 42 U.S.C. §2000e-5(f). Defendant employs more than twenty-five (25) persons and is engaged in an enterprise affecting commerce within the meaning of 42 U.S.C. §2000e.

III. Plaintiff filed charges with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) on February 21, 1973, charging that defendant United discriminated and continues to discriminate against plaintiff on the basis of sex (female). Plaintiff complained of and does complain of the fact that United maintained a policy and practice of terminating females, but not males, from their flight personnel (stewardess) positions upon marriage or contemplation of marriage; that plaintiff was forced to resign her position as a stewardess pursuant to this policy; that United refused to reinstate plaintiff; and that, when United did later rehire plaintiff, it refused and continues to refuse to credit plaintiff with all her former seniority. On August 29, 1974, plaintiff was granted the right to sue in United States District Court by the EEOC pursuant to 42 U.S.C. §2000e-5(f). A copy of the letter granting plaintiff the right to sue is attached hereto as Exhibit A. This suit has been filed within the required 90-day period prescribed in 42 U.S.C. §2000e-5(f).

IV. Plaintiff Evans began employment as a stewardess for defendant United in November, 1966, and completed stewardess training on December 28, 1966. Plaintiff was subsequently forced by defendant United to submit her resignation from her position as stewardess pursuant to United's policy and practice of terminating females, but not males, from their flight personnel positions upon marriage or contemplation of marriage. Plaintiff's employment by United was effectively terminated in February, 1968, pursuant to aforesaid forced resignation in accordance with said policy and practice.

V. On numerous subsequent occasions, plaintiff sought reinstatement as a stewardess with defendant United and was refused such reinstatement by defendant. In November, 1971, plaintiff again sought such reinstatement, and was effectively re-employed as a stewardess by United on February 16, 1972. Following one month of training completed on March 16, 1972, plaintiff has continued as a stewardess in the employ of United to this date.

VI. Plaintiff has been credited by defendant with "Company" (or "pay") seniority as of February 16, 1972, and with "stewardess" (or "system") seniority as of March 16, 1972. Among other effects, either or both types of seniority directly or indirectly determine a stewardess' wages, amount of minimum monthly compensation, amount of entitlement to furlough pay, amount of compensation for and duration and timing of vacation periods, rights to retention in case of furlough due to reduction in force, rights to re-employment after furlough, and rights to preference in assignment as to geographical location and type of aircraft.

VII. On November 7, 1968, defendant United and the Air Line Pilots Association, International (hereinafter referred to as Association), which was and is at all times relevant herein the exclusive collective bargaining agent of all stewardesses employed by United, concluded a "letter of agreement" whereby marriage would no longer disqualify a stewardess from continuing in the employ of United as a stewardess, and whereby stewardesses who had been terminated by reason of United's no-marriage policy would be offered reinstatement with no loss of seniority if they qualified under certain express conditions. A copy of this "letter of agreement" is attached hereto as Exhibit B, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

VIII. On October 16, 1969, defendant United and said Association concluded a second "letter of agreement", a copy of which is attached hereto as Exhibit C, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

IX. On October 16, 1972, plaintiff filed a grievance against defendant United protesting United's continuing failure to credit her with all former seniority. This grievance has been denied by United.

X. Defendant United has failed and refused and continues to refuse to credit plaintiff Evans with all former seniority earned by plaintiff from the date of her initial employment in November, 1966, and the date of her initial graduation from stewardess training on December 28, 1966, as well as continuous seniority from those dates, and has thereby caused caused plaintiff to suffer loss of wages and other benefits. This is a continuing violation of 42 U.S.C. §2000e-2, resulting from: (1) defendant United's wrongful conduct in implementation of its no-marriage rule, thereby forcing plaintiff Evans to be termiated as a stewardess in February, 1968, which conduct constituted discrimination on the basis of sex in violation of 42 U.S.C. §2000e-2; (2) defendant United's wrongful exclusion of plaintiff from the reinstatement opportunity provided to others in the two letters of agreement (referred to in paragraphs VII and VIII herein) executed with Association, which served to perpetuate and continue United's discriminatory policy as applied to plaintiff in violation of 42 U.S.C. §2000e-2; (3) defendant United's continued failure to provide for and offer plaintiff reinstatement as a stewardess until November, 1971, which failure constituted discrimination based upon sex in perpetuation of the effects of prior discrimination in violation of 42 U.S.C. §2000e-2; and (4) defendant United's continuing implementation of and failure to remove from plaintiff the continuing and presently operative effects of its discriminatory practices and policies, which failure constitutes continuing discrimination based upon sex in violation of 42 U.S.C. §2000e-2. As a result of defendant United's continuing discrimination against plaintiff because of her sex, plaintiff has been and continues to be deprived of her rightful seniority, wages, and other benefits of employment, in violation of 42 U.S.C. §2000e-2.

Wherefore, plaintiff demands judgment against defendant United Air Lines, and prays for the following relief:

1. An order permanently enjoining defendant United from engaging in any discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*;

2. An order requiring defendant United to restore to plaintiff and credit plaintiff with all seniority back to the starting date of her initial employment with United, including credit for any period of time, since such date, during which plaintiff was separated from United by reason of the discriminatory conduct of United, as well as credit for all such seniority actually earned;

3. An order requiring defendant United to compensate plaintiff for all amounts of back pay and other benefits of employment lost as a result of the discriminatory employment practices of said defendant;

4. An order requiring defendant United to pay to plaintiff exemplary damages in the amount of One Hundred Thousand ($100,000) Dollars;

5. An order requiring defendant to pay the cost of this suit;

6. An order requiring defendant to pay reasonable attorney's fees;

7. Any and all other relief as the Court deems proper, equitable and just.

Dated: September 4, 1974

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By .....
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467-9800

SECTION 703(h) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-2(h)]

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.

SECTION 706(e) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-5(e)]

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person

aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

SECTION 706(g) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-5(g)]

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.